UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 15-CR-18(FB)

-against- : United States Courthouse
: Brooklyn, New York

: Tuesday, May 24, 2016

CHEVELLE NESBETH,

Defendant.

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TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES SENIOR DISTRICT COURT JUDGE

A P P E A R A N C E S:

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COURTROOM DEPUTY: Criminal cause for sentencing, United States versus Nesbeth. I ask counsel to state appearances.

MR. SCOTTI: Afternoon, Your Honor, Paul Scotti for the United States.

MS. DAVID: Good afternoon, Your Honor, Amanda David on behalf of Chevelle Nesbeth who is present.

THE COURT: It has been awhile in coming, we had a number of adjournments. We are here.

Is your client prepared to be sentenced today?

MS. DAVID: Yes.

THE COURT: I take it you have shared the presentence report and everything that you know, you find to be relevant for her to consider?

MS. DAVID: Yes, Your Honor.

THE COURT: All right. So, let me first identify what I have in the file, I will go through the normal protocol before we talk about more things.

The presentence report is dated August 17th, 2015, and we have the addendum, which is dated April 14th, 2015. I think that is an inadvertent mistake, obviously should be 2016.

I have the letter of September 10th from Mr. Scotti and we have a guideline calculation of 20. We will get to formalize that in a second.

And, I have the letter of September 10th, 2015, from the office of the Federal Defender, actually signed by Ms. David.

I have a follow up letter of January 26, 2016, submitted by Ms. David at my request to address the issue of collateral consequences. I have a similar letter from the Government also dated January 26th.

So I appreciate the efforts that you have made to address the Court's concern about the impact of any of the collateral consequences in the context of this and possibly sentences in general.

The Probation Department's recommendation which you undoubtedly received a copy of, is dated April 17th, 2015. That maybe a mistake also. It could be 2016. And it recommends 24 months concurrent on both counts and you have the comments set forth therein. There is a $200 special assessment which is required as a matter of law. There is nothing else contained in the recommendation in terms of any conditions of supervised release, et cetera.

That is what I have in the file. Is there anything else that I should have before we make the requisite calculations?

MR. SCOTTI: I don't believe so, Your Honor.

MS. DAVID: Your Honor, I do believe there was an additional addendum from Probation in which they summarized the submissions.

THE COURT: I mentioned the addendum.

MS. DAVID: Additional.

THE COURT: I have one addendum, and the addendum that I have does address the collateral consequences.

Is there another one that was rendered? I'm not aware of more than one.

MR. SCOTTI: I believe that is the one that Your Honor was referring to that had the wrong year on it. That was the April 14th, 20-- it says '15.

THE COURT: It should be 2016.

MR. SCOTTI: Yes.

MS. DAVID: Yes.

THE COURT: There is just one addendum.

MS. DAVID: It is that one.

THE COURT: That addresses the collateral consequences.

Let's make the calculations and that is going to be at page five of the presentence report. There is no dispute about that. The base offense level is 24, she gets four levels off because she is the classic courier. If she was involved as a minimum participant. That makes the adjusted offense level of 20.

And she doesn't get any credit for acceptance, she chose as well is her right, to go to trial. So then we are dealing with a criminal history category of one, level 26-- 33 to 41 months with the guidelines. Everyone I think is in agreement with that.

MR. SCOTTI: Yes, Your Honor.

MS. DAVID: Yes, Your Honor.

THE COURT: Now, I will not put her in jail so I don't want her to have any anxiety as she stands in front of me while we are talking. I think it is unkind to string somebody along to the 11th hour.

But, I want to thank each of you for the excellent work that you have done in accommodating the Court's requests to address the issue of collateral consequences. Very helpful.

The Probation Department with its addendum also, you know, gave me a lot of information, and it will come as no surprise to tell you, you know, I will be issuing an opinion talking about collateral consequences, vis-a-vis sentencing.

And, that will be part of the statement of reasons, actually. But I just want to make sure that I have it straight because I don't want to misstate what the Government 's position is. I'm not exactly clear Mr. Scotti whether the Government believes or doesn't believe that you know collateral consequences under proper circumstances should be a 3553(a) factor, together with all the other factors that we normally consider. I want to make sure I have your position down correct. I don't want to issue an opinion that misstates it.

MR. SCOTTI: Your Honor, I would say that obviously ultimately sentencing is at the discretion of the Court.

THE COURT: Right.

MR. SCOTTI: The factors as set out by 3553 do not specifically address collateral consequences. Collateral consequences as the Court is aware, is largely statutory in nature. Whether the Court chooses to look at the-- at the effect of those consequences, when ultimately deciding a sentence, is at the Court's personal discretion.

But, the Government's position would be that the collateral consequences that apply in this case, to this particular defendant, are not covered under 3553 as a mitigating factor for the Court to look at.

THE COURT: Well, I have your submission, you do candidly acknowledge certain consequences in terms of teaching, the problems. So you seem to acknowledge that.

But I want to make sure I have it down right whether the Government, you know, I know-- what do you want me to say in the opinion, you do agree under proper circumstances, collateral consequences can be part of 3553(a) or you prefer not to commit the office.

MR. SCOTTI: I don't want to commit the office in any way. Obviously this is one particular case, one defendant. I'm one Assistant U.S. Attorney.

The Court has chosen to take on a larger issue and that is --

THE COURT: Right.

MR. SCOTTI: That is absolutely within the Court's right to try to address certain issues. But looking at this particular case, as the Government did, and how collateral consequences that would apply to this defendant--

THE COURT: I understand your position. I respect that. I mean it is perfectly okay in any given case, counsel for either side can say, we think, there are no real significant collateral consequences, that should be considered by the Court in a particular case.

For example, if I had in front of me a Blood or Crip, that was convicted of multiple murders, we would not be having this discussion. But this particular case, I think it is the ideal factual dynamic for the Court to address, you know, what I think has been neglected by the judiciary and lawyers for many years.

MR. SCOTTI: I do want to be clear, I know the Court has given me an opportunity to speak, I'm not sure that I have.

THE COURT: I put you on the spot. You are getting more than you bargained for here.

MR. SCOTTI: Yes.

Your Honor, again, the submissions that I have provided for the Court and with the record I'm making now, are specific to this defendant in this case. In this case, the Government doesn't feel that the collateral consequences are--

THE COURT: So your positions is, even if collateral consequences were to be considered as an appropriate 3553(a) factor, in this particular case, you would say, that it should not apply, do I have it down right?

MR. SCOTTI: I'm not saying that collateral consequences in any case are appropriate to consider under 3553. I'm not taking a position on behalf of the Government on the larger issue itself.

THE COURT: That is okay. I want to make sure I don't misstate the Government.

MR. SCOTTI: That is fine. So the Government's position would be in this particular case, that the collateral consequences that apply to this defendant, are not factors that the Court should consider.

THE COURT: I understand that you know you are not comfortable in making the statement on behalf of the Government on the overall issue.

So you know, in my research, you are going to see the product of all of this. Once again, I want to stop and thank each of you for the hard work that you did in addressing the issue.

So, I was really struck by a number of things and you probably realized that the ABA has conducted a study and has a database documenting about 50,000 collateral, State, Federal collateral consequences. It is astounding when I saw the numerosity quite frankly. The database, I think identifies about 1,300 federal statutory and regulatory consequences. I was just staggered by that, and that is what animated me to really take a hard look at this.

As you will read the decision, and I suspect you probably will read it, the Second Circuit has back in 2009, I believe in the Stewart case, in the passing way, in a decision authored by Judge Chen, accepted collateral consequences as a 3553(a) factor. So it seemed to me when I read the decision.

And we also have embraced collateral consequences in the Second Circuit for sure in the deportation context. So I think conceptually, the Second Circuit has pretty much come out on the side of what I consider the enlightened position of recognizing collateral consequences are something that is worthy of consideration in a 3553(a) mix.

There appears to be a split among other Circuits. I think the Fourth is pretty much in alignment with the Second. I think the Sixth and Tenth and Eighth maybe of a different mindset. And as the Tenth Circuit indicated in one case, the Supreme Court has not addressed the issue.

I think all of that is important to put down on paper by at least one Federal Court Judge, I think it is educational, I think it is informational, and I think to me it is something that has been overlooked, you know, to a fault. So you are going to see what I hope will be an instructive, helpful, useful decision which will be incorporated here as the statement of reasons.

Separate and apart from all of that, I have considered collateral consequences in my sentence of one year Probation, which I will give her unless the defendant wants to talk me out of it.

MS. DAVID: I do not wish to talk you out of it, Your Honor.

I would say that again I appreciate the Court's attention to what I think is a real important issue, particularly with Ms. Nesbeth who has spent a great deal of her life working very hard both on her education and in her goals of initially wanting to be an educator and now pursuing a different career path.

I think collateral consequences clearly play a very important-- have a great impact in her life and that of her family. I think she appreciates the Court's attention in consideration of the deep impact it would have.

THE COURT: Candidly, I was looking for the right case to address the issue. I would not have done it had I dealt with my last Blood case. This was the right case because as I write, even if it were not for the consideration of the collateral consequences that Ms. Nesbeth faces now, she might not be sentenced to an incarceratory period in any event. Her behavior is largely aberrational. It might have even qualified under classic pre-Booker law, as a departure. But certainly this is a major consideration now that we are dealing with post Booker variances. She has done a good job in rehabilitation in the year and a half she has been at liberty or more.

So those two major factors in addition to her good deeds and everything else, probably would not have resulted in an incarceratory sentence. I don't have to make that actual discrete decision because when you mix that with the collateral consequences I'm totally comfortable with a non incarceratory sentence.

She should realize, Ms. Nesbeth, that I also had written that your crime was serious and inexcusable and you don't get a gold star for doing that. And, you are going to be sitting at home for six months in house arrest, so to speak. You will be able to work. You will be able to go about your regular life, but you will not have a social life. So you will be under home confinement as a condition of your Probation.

And, I'm also going to require you to do some community service, 100 hours. So maybe, the Probation

Department I assume it will be up in Connecticut where you live, will find some meaningful work for you to do so you can be a role model for other young people who might be thinking about things like, I can make easy money and just, you know, not be too concerned about the criminal law.

I think that you can be a real good role motel considering your past background and you can be an effective ambassador to help dissuade other young people, to even think about violating the code of law.

So it is not that you are going to get a pass here, I'm not putting you in jail. So that is my take. I certainly want to encourage you folks to speak, you have a right to speak.

Ms. Nesbeth, you can speak to the Court before the sentence is officially pronounced. I wanted to layout any thinking in advance.

Anything else you wish to say?

MS. DAVID: Your Honor, in my understanding of the Court's proposed sentence, the only thing I would say is that Ms. Nesbeth since the time of her conviction, as I wrote in my letter, really struggled with the sheer impact of the actual conviction. I think the Court recalls her very audible and very visceral reaction to the verdict.

THE COURT: I do recall that.

MS. DAVID: Her family has been a great sense of support for her. Her mother is here in the courtroom. She does have aunts and other individuals not just in Connecticut but also here in New York. So to the extent that she is on Probation, I guess my request would be instead of placing her on six months of home confinement, instead give her a curfew so she is able to at least socialize with those individuals who have been loving and supportive of her throughout this time period. Particularly given that she is someone based on everything that we know about her, this is a complete aberration for her.

THE COURT: What is the difference between the curfew and the home confinement? I mean even with home confinement, she will be able to go to school and work.

MS. DAVID: Absolutely. I think the curfew at least gives her the ability to make visits to her family outside of Connecticut, and do that without having to ask for special permission each time from Probation.

It would not just be restricted to her going to school and going to work, and really be able to engage in that support system.

THE COURT: The curfew is from what, 7 to 7, something like that at night?

MS. DAVID: I would ask for a little bit later than that if the Court would consider nine or ten. Because--

THE COURT: You see I'm not so sensitive to your thoughts because I want her to sit and reflect upon the fact she committed a serious crime.

MS. DAVID: Absolutely.

THE COURT: Bring six hundred plus grams into this country is a serious matter. I know that she went to trial and she had the right to say that, you know, you have to prove I'm guilty. She may or may not in the field that she is in, listen to me, I have to make it clear that I don't-- I'm giving her a soft sentence. I want her to be perfectly aware, that I consider this to be a serious crime at the same time. I'm trying to balance this out.

MS. DAVID: I understand, Your Honor.

THE COURT: So, I think that to give her a period of reflection where she is going to be confined to the house, to let her reflect upon the fact she is not getting off Scott free is important. I could cut it down for four months perhaps. I'm--

Does the Government have a position on this issue?

MR. SCOTTI: Your Honor, as the Court said, the defendant committed a serious crime. The Court has also acknowledged that the sentence that the Court has already expressed that it is going to impose, is a soft sentence for such a serious crime.

If the Court sees fit to only impose six months of home confinement then the Government would say it should not be a day less than six months of home confinement. That is necessary to address the factors that are in 3553. The seriousness of the offense and deterrence of this crime going forward.

THE COURT: That is my sense of it also.

Let me hear from the defendant. I want to have an open conversation here about these matters.

We have these general conditions of Probation that attach automatically. The one year period of Probation, I gave it a short Probation period because there are collateral consequences that apply to somebody on Probation. So I'm trying to reflect upon all of these dynamics and factors. Certainly I will not officially pronounce sentence until I hear from Ms. David.

You know where my head is at. You should be clear about what is going on in Judge Block's mind. Do you wish to say anything? Now is the time to do it.

MS. DAVID: Yes, Your Honor.

THE COURT: Does your client wish to speak?

MS. DAVID: Can I have a moment Your Honor.

(Pause.)

THE COURT: She doesn't have to say anything, it is her right to do that if she wishes to speak.

MS. DAVID: I think she is nervous. But she does wish to talk to the Court.

THE COURT: I understand, it is a serious matter.

THE DEFENDANT: I want to say, thank you.

THE COURT: You have to try to speak louder.

THE DEFENDANT: I just want to say thank you for your decision.

THE COURT: Try to calm yourself and compose yourself.

MS. DAVID: I can say that Your Honor as Ms. Nesbeth is sort of gathering her thoughts. In speaking to her earlier, what she wanted to say specifically to the Court apart from thanking the Court of course for being so careful and considerate in its decision making, was also to express how seriously she does take her future and how seriously she does take the impact of this case.

She is very much aware and has been thoughtful and reflecting about the verdict and her conviction for the past year since it happened. She struggled with that a great deal and I think at this point, she wanted to really ask the Court for the opportunity to be able to pursue her education, to be able to find a career that would help her be able to support her family in the same way they have extended support to her throughout the time she has been in school.

I don't want to speak for her, but I do think she is again very grateful for the Court's careful consideration.

THE COURT: Well, I can't expunge her conviction nor would I. But you know, it is possible that sometime in the future, that she can make an application and, you know, the Eastern District of New York, is sort of in the vanguard of sentencing reform perhaps. Judge Gleason issued that profound decision where he did expunge a criminal conviction, that is on appeal. I have no idea of how that is going to play about in the Second Circuit, except, I'm pretty much sure they will write a profound decision one way or the other.

Who is handling that from your office?

MR. SCOTTI: I don't know, Your Honor.

THE COURT: If the Circuit affirms Judge Gleeson then it will open the door for people like Ms. Nesbeth to make application at sometime in the future under proper circumstances for expungement. I can't do that now.

I think that the decision that I am rendering will be a value in terms of her pursuing this in the future. That is the best I can do when it comes to sentence is to deal with the collateral consequences as a sentencing factor and write about that.

So I hope that what I have done here will be of value to Ms. Nesbeth's of the world, and she sort of is going to be a pioneer here a little bit.

You will have an opportunity to think about all of this. There is nothing much more I can say then what I have already said today.

The official sentence will be one year Probation period, no incarceration, you have to pay a $200 special assessment as a matter of law, forthwith. $100 for each crime of conviction, mandated by statute.

You are not going to be fined because I don't think you have the financial wherewithal to pay a fine.

There will be general conditions of Probation which the Clerk of the Court is handing to you now.

Ms. David will make you coordinate your Probation responsibilities with the proper Probation Department. I imagine it will be in Connecticut, but Ms. David will get you organized and coordinate the matters with the Probation Department here, which I guess will transfer the Probation up to Connecticut.

You are going to have to report in periodically, you will have to follow what is in those fourteen conditions, keep employment, if you can, and stay out of trouble. Don't-- keep bad company so to speak. I'm sure you are going to do fine.

That is for one year. After that, you are going to be free of any requirements to check in with the Probation Department, you will be free of supervision and you will be free to pursue your career as a teacher or whatever.

I'm sure that based on what I see of the efforts that you have made so far, that you will have a good productive life and sometimes, a negative can be turned into a positive. I know people who have come up through the criminal justice process and they have literally turned their lives around. Some of them become Probation officers and some of them have devoted their lives to helping people such as yourself.

Let's see how it plays out with you. I want to offer you some words of encouragement at this particular time in your life.

Once again having said that, I don't want you to think that I condone your criminal activities at all. So you should understand that. You will be able to think about that while you are on home confinement. That is exactly what I want you to do. All right.

I think that is about all I can say.

Once again Mr. Scotti, thank you for your major efforts here in a difficult situation. You have done well by your office, even though I was trying to get a commitment from you one way or the other. I think it is okay for you to be a little bit cautious under the circumstances and I want to thank you for your efforts as well, Ms. David.

MR. SCOTTI: Thank you Your Honor.

MS. DAVID: Thank you.

(Matter concluded.)

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